TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1924

No. [redacted]78

ERIE COAL & COKE CORPORATION, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 2, 1922.

($0,859)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 351.

ERIE COAL & COKE CORPORATION, APPELLANT,

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THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 10, 1923.

[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

ERIE COAL AND COKE CORPORATION

v.

UNITED STATES.

I. PETITION—Filed Feb. 26, 1923—AND AMENDED PETITION—Filed Mar. 14, 1923

To the Honorable Court of Claims:

Petitioner for an Amended Petition herein respectfully alleges and shows to the Court:

1. That your claimant is a corporation duly organized and existing under and by virtue of the laws of the State of New York and lawfully engaged in business under the laws of the State of New York, with its office and principal place of business in the City, County and State of New York.

2. The Act of Congress of July 11, 1919 (41 U. S. Statutes, 105), conferred upon the Secretary of War the right, power and authority to sell any surplus supplies in the possession of the Government for the use of the War Department, to any corporation or individual, upon such terms as may be deemed best.

[fol. 2] 3. In the exercise of the authority and discretion conferred upon him by the Act of Congress of July 11, 1919, Honorable John W. Weeks, Secretary of War for the United States, did cause to be published and circulated an advertisement (Claimant's Exhibit A, hereto annexed and made a part hereof as if herein fully set forth) for the sale, at public auction, of approximately 40,000 short tons of sodium nitrate of the grade, kind and quality specified in Claimant's Exhibit B, hereto annexed, the same being surplus supplies in possession of the Government for use of the War Department.

4. That pursuant to the authority in him vested by said Act of Congress, the said Secretary of War did issue and circulate, as the terms of sale of said auction, a document, a copy of which is hereto annexed marked Claimant's Exhibit B and made a part hereof as if herein fully set forth.

5. That the said auction sale was largely attended, there being present and registered more than one hundred interested parties and prospective bidders.

6. That pursuant to such authority and such notice, and upon the terms stated in Claimant's Exhibit B, the Secretary of War, by Robert Fox, his duly appointed auctioneer, did offer for sale as a part of the sodium nitrate so advertised for sale, one lot of 13,920 short tons of sodium nitrate, located at Middletown, Pa.

7. That this claimant did then and there bid for said lot of 13,920 tons upon the terms and conditions offered in said circular advertisements of auction sale, the sum of $25.00 per ton, or a total of $348,000.

[fol. 3] 8. That this claimant's bid was the highest bid at said auction sale for said lot of sodium nitrate and the same was then and there knocked down and sold to this claimant at the said price upon the terms and conditions set forth in the circular advertisements of auction sale, Claimant's Exhibit B, hereto annexed.

9. That pursuant to the terms and conditions of said auction sale, as contained and set forth in Claimant's Exhibit B hereto annexed, this claimant did then and there deposit with the Ordnance Department of the War Department as part payment upon the sale, $20,000, in a certificate of deposit of the American Exchange National Bank and $22,000 in par value of United States Loan Bonds, making a total of $42,000 on account thereof, which was accepted and a receipt therefor issued to this claimant, a copy of which is hereto annexed marked Claimant's Exhibit C and made a part hereof as if herein fully set forth.

10. That thereafter and on the 22nd and 24th days of April, 1922, this claimant, by its duly authorized Treasurer, attended at the office of the Secretary of War, at Washington, D. C., and then and there offered to sign and enter into, and demanded that the Secretary of War sign and enter into a written agreement as provided for in the terms set forth in Claimant's Exhibit B hereto annexed, and then and there offered to pay the balance of the full purchase price of said lot of sodium nitrate and to do and perform each, every and all of the terms, conditions and undertakings by it agreed to be performed; then and there demanded that the Secretary of War, pursuant to the terms of said auction sale, deliver to claimant the said lot of sodium [fol. 4] nitrate at Middletown, Pa., and offered to hold itself ready and willing to do and perform all the terms, conditions and undertakings by it agreed to be performed until and including Monday, April 24, 1922.

11. That the Secretary of War refused claimant's said offer of performance and failed, refused and neglected to comply with its said demands stating his reason for his refusal that in his opinion the aforesaid price of $25.00 per ton for said sodium nitrate was inadequate.

12. That from the 13th day of April, 1922, to and including the 24th day of April, 1922, this claimant held itself ready, able and willing, and offered to do and perform all the terms, conditions and undertakings by it agreed to be done or performed.

13. That thereafter the Secretary of War on or about June 1, 1922, returned to this claimant the amount deposited as a part payment as aforesaid, which it accepted without prejudice to any of its claims or rights against the Government of the United States.

14. On information and belief, the fair and reasonable market value of said sodium nitrate, at Middletown, Pa., on the 13th day of April, 1922, and to and including the 24th day of April, 1922, was $63.60 per ton, and the total value of the whole lot of 13,920 tons was $885,312.

15. Your petitioner represents that by reason of the facts hereinbefore stated it has been damaged and is entitled to be paid by the United States the sum of $537,312, against which there are no just credits or off-sets.

[fol. 5] 16. No other action than that recited hereinbefore has been had on this claim in the Congress of the United States; or by any of the Departments of the Government of the United States; no assignment or transfer of this claim, or any part thereof, or interest therein has been made.

17. Your claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

Your claimant for a second separate claim respectfully alleges as follows:

18. That your claimant is a corporation duly organized and existing under and by virtue of the laws of the State of New York and lawfully engaged in business under the laws of the State of New York, with its office and principal place of business in the City, County and State of New York.

19. The Act of Congress of July 11, 1919 (41 U. S. Statutes, 105), conferred upon the Secretary of War the right, power and authority to sell any surplus supplies in the possession of the Government for the use of the War Department, to any corporation or individual, upon such terms as may be deemed best.

20. In the exercise of the authority and discretion conferred upon him by the Act of Congress of July 11, 1919, Honorable John W. Weeks, Secretary of War for the United States, did cause to be published and circulated an advertisement (Claimant's Exhibit A hereto annexed and made a part hereof as if herein fully set forth) for the sale, at public auction, of approximately 40,000 short tons of sodium [fol. 6] nitrate of the grade, kind and quality specified in Claimant's Exhibit B hereto annexed; the same being surplus supplies in the possession of the Government, for use of the War Department.

21. That pursuant to the authority in him vested by said Act of Congress, the said Secretary of War did issue and circulate, as the terms of sale of said auction, a document, a copy of which is hereto annexed marked Claimant's Exhibit B, and made a part hereof as if herein fully set forth.

22. That the said auction sale was largely attended, there being present and registered more than one hundred interested parties and prospective bidders.

23. That pursuant to such authority and such notice, and upon the terms stated in Claimant's Exhibit B, the Secretary of War, by Robert Fox, his duly appointed auctioneer, did offer for sale as a part of the sodium nitrate so advertised for sale, one lot of 5,000 short tons of sodium nitrate, located at Nitro, West Virginia.

24. That this claimant did then and there bid for said lot of 5,000 tons upon the terms and conditions offered in said circular advertisements of auction sale, the sum of $25.00 per ton, or a total of $125,000.

25. That this claimant's bid was the highest bid at said auction sale for said lot of sodium nitrate and the same was then and there knocked down and sold to his claimant at the said price upon the terms and conditions set forth in the circular advertisements of auction sale, Claimant's Exhibit B hereto annexed.

[fol. 7] 26. That pursuant to the terms and conditions of said auction sale, as contained and set forth in Claimant's Exhibit B hereto annexed this claimant did then and there deposit with the Ordance Department of the War Department as part payment upon the sale $13,000 in par value of United States Loan Bonds, which was accepted and a receipt therefor issued to this claimant, a copy of which is hereto annexed marked Claimant's Exhibit D and made a part hereof as if herein fully set forth.

27. That thereafter and on the 22nd and 24th days of April, 1922, this claimant, by its duly authorized Treasurer, attended at the office of the Secretary of War, at Washington, D. C., and then and there offered to sign and enter into and demanded that the Secretary of War sign and enter into a written agreement as provided for in the terms set forth in Claimant's Exhibit B hereto annexed, and then there offered to pay the balance of the full purchase price of said lot of sodium nitrate and to do and perform each, every and all of the terms, conditions and undertakings by it agreed to be performed; then and there demanded that the Secretary of War, pursuant to the terms of said auction sale, deliver to claimant the said lot of sodium nitrate at Nitro, West Virginia, and offered to hold itself ready and willing to do and perform all the terms, conditions and undertakings by it agreed to be performed until and including Monday, April 24, 1922.

28. That the Secretary of War refused claimant's said offers of performance and failed, refused and neglected to comply with its said demands stating his reason for his refusal that in his opinion the aforesaid price of $25.00 per ton for said sodium nitrate was inadequate.

[fol. 8] 29. That from the 13th day of April, 1922, to and including the 24th day of April, 1922, this claimant held itself ready, able and willing, and offered to do and perform all the terms, conditions and undertakings by it agreed to be done or performed.

30. That thereafter the Secretary of War on or about June 1, 1922, returned to this claimant the amount deposited as a part payment as aforesaid, which it accepted without prejudice to any of its claims or rights against the Government of the United States.

31. On information and belief, the fair and reasonable market value of said sodium nitrate, at Nitro, West Virginia, on the 13th day of April, 1922, and to and including the 24th day of April, 1922, was $66.08 per ton, and the total value of the whole lot of 5,000 tons was $330,400.

32. Your petitioner represents that by reason of the facts hereinbefore stated it has been damaged and is entitled to be paid by the United States the sum of $205,400, against which there are no just credits or offsets.

33. No other action than that recited hereinbefore has been had on this claim in the Congress of the United States, or by any of the Departments of the Government of the United States; no assignment or transfer of this claim, or any part thereof, or interest therein, has been made.

34. Your claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

[fol. 9] Your claimant for a third separate claim respectfully alleges as follows:

35. That your claimant is a corporation duly organized and existing under and by virtue of the laws of the State of New York and lawfully engaged in business under the laws of the State of New York, with its office and principal place of business in the City, County and State of New York.

36. The Act of Congress of July 11, 1919 (41 U. S. Statutes, 105), conferred upon the Secretary of War the right, power and authority to sell any surplus supplies in the possession of the Government for the use of the War Department, to any corporation or individual, upon such terms as may be deemed best.

37. In the exercise of the authority and discretion conferred upon him by the Act of Congress of July 11, 1919, Honorable John W. Weeks, Secretary of War for the United States, did cause to be published and circulated an advertisement (Claimant's Exhibit A hereto annexed and made a part hereof as if herein fully set forth) for the sale, at public auction, of approximately 40,000 short tons of sodium nitrate of the grade, kind and quality specified in Claimant's Exhibit B hereto annexed the same being surplus supplies in possession of the Government for use of the War Department.

38. That pursuant to the authority in him vested by said Act of Congress, the said Secretary of War did issue and circulate, as the terms of sale of said auction, a document, a copy of which is hereto

annexed marked Claimant's Exhibit B and made a part hereof as if herein fully set forth.

[fol. 10] 39. That the said auction sale was largely attended, there being present and registered more than one hundred interested parties and prospective bidders.

40. That pursuant to such authority and such notice, and upon the terms stated in Claimant's Exhibit B the Secretary of War, by Robert Fox, his duly appointed auctioneer, did offer for sale as a part of the sodium nitrate so advertised for sale, one lot of 10,600 short tons of sodium nitrate, located at Jacksonville, Tenn.

41. That this claimant did then and there bid for said lot of 10,600 tons upon the terms and conditions offered in said circular advertisements of auction sale, the sum of $22.50 per ton, or a total of $238,500.

42. That this claimant's bid was the highest bid at said auction sale for said lot of sodium nitrate and the same was then and there knocked down and sold to this claimant at the said price upon the terms and conditions set forth in the circular advertisements of auction sale, Claimant's Exhibit B hereto annexed.

43. That pursuant to the terms and conditions of said auction sale, as contained and set forth in Claimant's Exhibit B hereto annexed, this claimant did then and there deposit with the Ordnance Department of the War Department, as part payment upon the sale, $24,000, in par value of United States Loan Bonds, which was accepted and a receipt therefor issued to this claimant, a copy of which is hereto annexed marked Claimant's Exhibit D and made a part hereof as if herein fully set forth.

[fol. 11] 44. That thereafter and on the 22nd and 24th days of April, 1922, this claimant, by its duly authorized Treasurer, attended at the office of the Secretary of War, at Washington, D. C., and then and there offered to sign and enter into and demanded that the Secretary of War sign and enter into a written agreement as provided for in the terms set forth in Claimant's Exhibit B hereto annexed, and then and there offered to pay the balance of the full purchase price of said lot of sodium nitrate and to do and perform each, every and all of the terms, conditions and undertakings by it agreed to be performed; then and there demanded that the Secretary of War, pursuant to the terms of said auction sale, deliver to claimant the said lot of sodium nitrate at Jacksonville, Tenn., and offered to hold itself ready and willing to do and perform all the terms, conditions and undertakings by it agreed to be performed until and including Monday, April 24, 1922.

45. That the Secretary of War refused claimant's said offers of performance and failed, refused and neglected to comply with its said demands stating his reason for his refusal that in his opinion the aforesaid price of $22.50 per ton for said sodium nitrate was inadequate.

46. That from the 13th day of April, 1922, to and including the 24th day of April, 1922, this claimant held itself ready, able and willing, and offered to do and perform all the terms, conditions and undertakings by it agreed to be done or performed.

47. That thereafter the Secretary of War on or about June 1, 1922, returned to this claimant the amount deposited as a part payment as [fol. 12] aforesaid, which it accepted without prejudice to any of its claims or rights against the Government of the United States.

48. On information and belief, the fair and reasonable market value of said sodium nitrate, at Jacksonville, Tenn., on the 13th day of April, 1922, and to and including the 24th day of April, 1922, was $66.43 per ton, and the total value of the whole lot of 10,600 tons was $704,158.

49. Your petitioner represents that by reason of the facts hereinbefore stated it has been damaged and is entitled to be paid by the United States the sum of $465,658, against which there are no just credits or offsets.

50. No other action than that recited hereinbefore has been had on this claim in the Congress of the United States, or by any of the Departments of the Government of the United States; no assignment or transfer of this claim, or any part thereof, or interest therein, has been made.

51. Your claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

Your claimant for a fourth separate claim respectfully alleges as follows:

52. That your claimant is a corporation duly organized and existing under and by virtue of the laws of the State of New York and lawfully engaged in business under the laws of the State of New [fol. 13] York, with its office and principal place of business in the City, County and State of New York.

53. The Act of Congress of July 11, 1919 (41 U. S. Statutes, 105), conferred upon the Secretary of War the right, power and authority to sell any surplus supplies in the possession of the Government for the use of the War Department, to any corporation or individual, upon such terms as may be deemed best.

54. In the exercise of the authority and discretion conferred upon him by the Act of Congress of July 11, 1919, Honorable John W. Weeks, Secretary of War for the United States, did cause to be published and circulated an advertisement (Claimant's Exhibit A hereto annexed and made a part hereof as if herein fully set forth) for the sale, at public auction, of approximately 40,000 short tons of sodium nitrate of the grade, kind and quality specified in Claimant's

Exhibit B hereto annexed, the same being surplus supplies in the possession of the Government for use of the War Department.

55. That pursuant to the authority in him vested by said Act of Congress, the said Secretary of War did issue and circulate, as the terms of sale of said auction, a document, a copy of which is hereto annexed marked Claimant's Exhibit B and made a part hereof as if herein fully set forth.

56. That the said auction sale was largely attended, there being present and registered more than one hundred interested parties and prospective bidders.

[fol. 14] 57. That pursuant to such authority and such notice, and upon the terms stated in Claimant's Exhibit B the Secretary of War, by Robert Fox, his duly appointed auctioneer, did offer for sale as a part of the sodium nitrate so advertised for sale, three lots embracing 29,520 short tons of sodium nitrate, located 13,920 tons at Middletown, Pa., 5,000 tons at Nitro, West Virginia, and 10,600 tons at Jacksonville, Tenn.

58. That this claimant did then and there bid for said three lots of 13,920, 5,000 and 10,600 tons upon the terms and conditions offered in said circular advertisements of auction sale the sum of $25.00 per ton for that at Middletown, Pa., and Nitro, West Virginia, and $22.50 per ton for that at Jacksonville, Tenn., or a total of $711,500.

59. That this claimant's bid was the highest bid at said auction sale for said lots of sodium nitrate and the same were then and there knocked down and sold to this claimant at the said price upon the terms and conditions set forth in the circular advertisements of auction sale, Claimant's Exhibit B hereto annexed.

60. That pursuant to the terms and conditions of said auction sale, as contained and set forth in Claimant's Exhibit B hereto annexed, this claimant did then and there deposit with the Ordnance Department of the War Department as a part payment upon the sale $20,000 in a certificate of deposit of the American Exchange National Bank and $59,000. in par value of the United States Government Loan Bonds, making a total of $79,000. on account thereof, which was accepted and receipts therefor issued to this claimant. [fol. 15] copies of which are hereto annexed marked Claimant's Exhibits C and D and made a part hereof as if herein fully set forth.

61. That thereafter and on the 22nd and 24th of April, 1922, this claimant, by its duly authorized Treasurer, attended at the office of the Secretary of War, at Washington, D. C., and then and there offered to sign and enter into and demanded that the Secretary of War sign and enter into a written agreement as provided for in the terms set forth in Claimant's Exhibit B hereto annexed, and then and there offered to pay the balance of the full purchase price

of said lots of sodium nitrate and to do and perform each, every and all of the terms, conditions and undertakings by it agreed to be performed; then and there demanded that the Secretary of War, pursuant to the terms of said auction sale, deliver to claimant the said lots of sodium nitrate at Middletown, Pa., Nitro, West Virginia, and Jacksonville, Tenn., and offered to hold itself ready and willing to do and perform all the terms, conditions and undertakings by it agreed to be performed until and including Monday, April 24, 1922.

62. That the Secretary of War refused claimant's said offers of performance and failed, refused and neglected to comply with its said demands stating his reason for his refusal that in his opinion the aforesaid prices of $25.00 and $22.50 respectively per ton were inadequate.

63. That from the 13th day of April, 1922, to and including the 24th day of April, 1922, this claimant held itself ready, able and willing, and offered to do and perform all the terms, conditions and undertakings by it agreed to be done or performed.

[fol. 16] 64. That thereafter the Secretary of War on or about June 1, 1922, returned to this claimant the amount deposited as a part payment as aforesaid, which it accepted without prejudice to any of its claims or rights against the Government of the United States.

65. On information and belief, the fair and reasonable market value of said sodium nitrate, at Middletown, Pa., on the 13th day of April, 1922, and to and including the 24th day of April, 1922, was $63.60 per ton, and the total value of the whole lot of 13,920 tons was $885,312; the fair and reasonable market value of said sodium nitrate, at Nitro, W. Va., on the 13th day of April, 1922, and to and including the 24th day of April, 1922, was $66.08 per ton, and the total value of the whole lot of 5,000 tons was $330,400; the fair and reasonable market value of said sodium nitrate, at Jacksonville, Tenn., on the 13th day of April, 1922, and to and including the 24th day of April, 1922, was $66.43 per ton, and the total value of the whole lot of 10,600 tons was $704,158.

66. Your petitioner represents that by reason of the facts hereinbefore stated it has been damaged and is entitled to be paid by the United States the sum of $1,208,370, against which there are no just credits or off-sets.

67. No other action than that recited hereinbefore has been had on this claim in the Congress of the United States, or by any of the Departments of the Government of the United States; no assignment or transfer of this claim, or any part thereof, or interest therein, has been made.

[fol. 17] 68. Your claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

Walter John King, 11 Broadway, New York City, N. Y., Attorney for Claimant. John S. Wise, Jr., 20 Broad Street, New York City, N. Y., Of Counsel.

I, Walter John King, do state on oath that I am the Attorney of record in this case by virtue of a Power of Attorney granted me by the claimant herein, Erie Coal and Coke Corporation, and heretofore filed in this case; that I have read the foregoing Petition hereto attached and know the contents thereof, and that I am informed and believe that the facts therein stated are true, and upon such information and belief, I hereby verify said Petition.

Walter John King.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 14th day of March, 1923. Joshua W. Carr, Notary Public. My commission expires June 15, 1925.

[fol. 18] CLAIMANT'S EXHIBIT A TO PETITION

Sodium Nitrate

(Approximately 40,000 Tons)

To be sold by auction Thursday, April 13th, 1922, 10 A. M., Eastern Time at Washington, D. C.

Chemicals

Quantities and Locations.—Middletown Ordnance Reserve Depot, Middletown, Pa., approximately 17,836 short tons Morgantown Gen. Ordnance Reserve Depot, South Amboy, N. J., approximately 1,234 short tons Nitro, W. Va., approximately 7,378 short tons Old Hickory Plant, Jacksonville, Tenn., approximately 13,554 short tons.

Terms of Sale and Other Information.—Inspection of the material is invited at the points indicated. It is to be sold "as is," "where is" and no refund or adjustment will be allowed after sale and award is made owing to material not fulfilling expectations as to quantity, quality, condition or delivery. The Government reserves the right to withdraw any lots from sale.

Terms.—10% deposit in the form of cash, certified check or U. S. Government Bonds at par will be required at the time bid is made. Opportunity will be offered for the purchase of lots as small as 100 tons or for the entire amount. Material will be loaded out and shipped by the purchaser at his own expense.

The sale will be conducted at Temporary Building No. 5, 20th & B Sts., N. W., Washington, D. C., on the date and at the time indicated above:

For further information address: Chairman Ordnance Salvage [fol. 19] Board, Munitions Bldg., Washington, D. C., War Department.

CLAIMANT'S EXHIBIT B TO PETITION

Sale by Auction of Sodium Nitrate

10.00 a. m. April 13, 1922

Washington, D. C.

Quantity

There will be sold in this auction approximately 40,000 short tons of sodium nitrate located as follows:

Middletown Ord. Res. Depot, Middletown, Pa., a maximum of approximately 17,836 short tons.

It is proposed to sell the entire quantity held by the United States in storage at this place. The quantity shown by the books to have been stored at that place was 17,836 short tons, which has been reduced by shrinkage, handling, etc., to an indefinite amount which cannot be determined. The United States will not obligate itself to deliver definite quantities in excess of 15,000 tons, but proposes to enter into contracts for the sale of the entire quantity, including the indefinite balance beyond 15,000 tons.

Morgan Gen. Ord. Depot, So. Amboy, N. J., a maximum of approximately 1,190 short tons.

It is proposed to sell the entire quantity held by the United States in storage at this place. The quantity shown by the books to have [fol. 20] been stored at that place was 1,190 short tons, which has been reduced by shrinkage, handling, etc., to an indefinite amount which cannot be determined. The United States will not obligate itself to deliver definite quantities in excess of 1,000 tons, but proposes to enter into contracts for the sale of the entire quantity, including the indefinite balance beyond 1,000.

Nitro, West Virginia.

Out of the stocks held by the United States at this point, there will be sold 9,700 short tons.

Old Hickory Powder Plant, Jacksonville, Tenn.

There will be sold a sufficient quantity from the stocks held at this point to make up a total of approximately 40,000 tons. This will

involve the sale from Old Hickory of a minimum of approximately 11,274 short tons. This amount will be definitely fixed by estimation subsequent to the sale of the nitrate at the foregoing three places and prior to the sale of the nitrate at Old Hickory.

Quality

The Government can make no guarantee or warranty as to chemical analysis, moisture content, condition as to crystallization, bags, etc., and under no consideration will a refund or adjustment be allowed after a sale and an award is made due to the material not coming up to expectations as to quality or condition. Failure to have inspected the nitrate offered for sale will not be considered as a basis for a claim against the United States.

[fol. 21]

Condition

The following statement of condition of the nitrate offered for sale at this auction is furnished for the information of bidders. The United States, however, makes no guarantee or warranty as to the accuracy of this statement and no refund or adjustment will be allowed after the sale and an award is made due to variation of condition of the material from that furnished herewith.

Middletown.—Nitrate is stored in one warehouse, one-story, approximately 150 feet wide with a loading platform entirely along one side at car floor height and railroad trackage against this loading platform the entire length of the building. All the nitrate is in bags and 80% of the bags are believed to be in condition for reshipping.

Morgan.—The nitrate is stored in one building with the greater percentage in bags and two tons in boxes. All nitrate is partially set.

Nitro.—The material is stored in bulk, is slightly caked; can be broken out with a pick.

Old Hickory.—Eight hundred tons are stored in Bldgs. 86 and 87, and 2,000 tons in Bldgs. 11 and 12; nearly all originally bagged, but bags are now rotted to such an extent that nitrate is practically bulk, containing pieces of bags. Four thousand tons are in nitrate storehouse No. 6 originally stored in warehouse which was burned. This material was bagged, but bags are now partly burned. Balance in buildings Nos. 1 to 5 and No. 7. Nitrate bagged, with bags fairly good and nitrate in better condition than that in other buildings.

[fol. 22]

Terms of the Sale

Material will be sold "as is," "where is" in its present condition, at the plants where located excepting the case of the nitrate located at the Old Hickory Powder Plant, which will be sold "as is," f. o. b. cars, placed Tennessee Central R. R., transwer near Jacksonville, Tenn.

All material sold in this sale must be entirely removed from the plants where located by the following dates set after each plant and

will be sold with the understanding that the purchaser will pay to the United States liquidated damages of 25c. per ton per month for all nitrate not removed on these dates:

Middletown Ord. Res. Depot—Aug. 31st.
Morgan Gen. Ord. Depot—May 30th.
Nitro, W. Va.—Aug. 1st.
Old Hickor Ord. Res. Depot—Aug. 31st.

In the event that the nitrate is loaded out for the purchaser by the United States, shipping instructions must be furnished in sufficient time to permit loading out by the above dates. The mere submission of shipping instructions in advance of the above dates will not operate to relieve the purchaser of liquidated damages for non-removal of nitrate. Bidders will be required and should come to the sale prepared to make a deposit in the form of cash or certified checks made payable to the Treasurer of the United States in the amount of 10% of the purchase price of nitrate purchased. (U. S. Government bonds at par value will be accepted in lieu thereof.) This deposit will be retained by the United States to apply against the last shipment of sodium nitrate on the contract with the purchaser. Acceptance by [fol. 23] the Government of any bid will not be final until the execution of a contract and bond and upon failure by the purchaser within ten days after notice of the acceptance of his bid to execute said contract the Government may withdraw such acceptance and make such disposition of said nitrate as it may desire free of any claim of purchaser in which event the 10% theretofore paid upon the acceptance of said bid shall be forfeited to the United States as liquidated damages.

Railroad weights at point of shipment will govern. The Government will not be responsible for any demurrage occurring after loading. At the time of loading a representative of the successful bidder must be present to verify weight, otherwise weights found by the Government representative will be accepted. Weights ascertained at the time of loading will be final in so far as the Government is concerned and no claims for shortage after this time will be allowed.

Where nitrate is shipped in bags an allowance of 7/10 of one per cent will be made for bagging.

Payment must be made for all material shipped by cash previous to shipment or a sight draft will be attached to the bill of lading.

Contracts

Contracts will be prepared and administered for the United States by the Philadelphia District Office of the Ordnance Salvage Board. No assignment of the contract or the bill of sale of the property awarded will be permitted without written consent of the United States through the Ordinance Salvage Board.

[fol. 24] (A)

For Successful Bidders on Amounts Totaling 500 Tons or Less

The successful bidders will be required to enter into a contract with the Ordnance Salvage Board for faithful performance of all the terms and conditions of the sale and will be required to furnish a bond or approved surety guaranteeing such faithful performance in an amount satisfactory to the Chairman of the Ordnance Salvage Board, which shall be in an amount of not less than 25% of the purchase price.

(B)

For Successful Bidders on Amounts Totaling in Excess of 500 Tons

Purchaser will be required upon acceptance of his bid and before delivery of nitrate to enter into a written contract embodying the following terms, and to give a bond in double the amount of his bid, with surety acceptable to the Secretary of War, conditioned upon the faithful performance of the terms of said contract:

Government at its election may rescind said sale at any time before August 1, 1922, in which event the purchaser shall immediately, and not later than November 30, 1922, at his own expense, deliver to the Government f. o. b. cars, at Savanna Proving Ground, Illinois, sodium nitrate in equal quantity with that theretofore delivered by the Government to purchaser, and of the following specifications:

Not less than 96 per cent of net weight, to be refined nitrate of soda,

[fol. 25] and the Government shall return to purchaser all money theretofore received in payment for such nitrates, and relieve him from any obligation for further payments.

Loading

Middletown.—This material is to be sold "as is," "where is," to be loaded out by the purchaser. The Pennsylvania R. R. spots and removes cars at the nitrate warehouse without charge. There is at the establishment certain roller conveyor which, if not needed by the United States, may be used by the purchaser without charge in loading out the material, but no guarantee as to the quantity, kind, and condition of this material available for the use of the contractor is made.

The United States will, at the option of the purchaser, agree to load out the material purchased by him, charging the purchaser, in addition to the contract price for the nitrate, the actual cost, consisting of labor, material, and indirect expenses, required to perform this service.

Morgan.—This material is to be sold "as is," "where is," to be loaded out by the purchaser. The United States will spot and re-

move cars at the nitrate warehouse without cost to the purchaser. There is at the establishment certain roller conveyor which, if not needed by the United States, may be used by the purchaser without charge in loading out the material, but no guarantee as to the quantity, kind, and condition of this material available for the use of the contractor is made.

The United States will, at the option of the purchaser, agree to load out the material purchased by him, charging the purchaser, in addition to the contract price for the nitrate, the actual cost, consisting of labor, material, and indirect expenses, required to perform [fol. 26] this service.

Nitro.—This material is to be sold "as is," "where is," to be loaded out by the purchaser. This material is located in warehouses of the Charleston Industrial Corporation who have made the following offer to load out material for the purchaser "Charleston Industrial Corporation will contract with the purchaser of nitrate of soda to load all nitrate stored at Nitro in its present state for 90c. per short ton carload lots. This price includes switching charge. Any bagging or re-bagging will have to be negotiated separately."

Old Hickory.—This material will be sold "as is," f. o. b. cars, placed on the Tennessee Central Transfer near Jacksonville, Tenn., in short ton carload lots.

CLAIMANT'S EXHIBIT C TO PETITION

Ordnance Dept.

War Department

Norfolk Quartermaster Intermediate Depot

Norfolk, Virginia

Remount Depot, Camp Meade, Md.

April 13, 1922.

Paddle No. 31.
Erie Coal & Coke Co., New York City.

Middletown:

12,920 tons Sodium Nitrate @ $25.00	348,000.00
Deposit	42,000.00
	306,000.00

[fol. 27] CLAIMANT'S EXHIBIT D TO PETITION

Ordnance Department

War Department

Norfolk Quartermaster Intermediate Depot

Norfolk, Virginia

Remount Depot, Camp Meade, Md.

April 13, 1922.

Paddle No. 31.
Erie Coal & Coke Company, New York City.

Old Hickory:	
10,600 Tons Sodium Nitrate @ $22.50	238,500
Nitro:	
5,000 Tons Sodium Nitrate @ $25.00	125,000
	363,500
Deposit	37,000
	326,500.00

[fol. 28] III. DEMURRER TO AMENDED PETITION—Filed March 26, 1923

Comes now the defendant, by the Attorney General, and demurs to the amended petition filed in the above-entitled cause on the ground that the same does not allege a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. P. M. Cox, Attorney. Dwight E. Rorer, Attorney.

IV. ARGUMENT AND SUBMISSION OF DEMURRER—April 3, 1923

On April 3, 1923, the demurrer in this case was argued and submitted by Mr. Percy M. Cox, for the defendant, and by Mr. John S. Wise, for the plaintiff.

[fol. 29] V. OPINION OF THE COURT BY CAMPBELL, CH. J.—Entered April 16, 1923

CAMPBELL, *Chief Justice,* delivered the opinion of the court:

This case is before the court upon demurrer to the petition.

The plaintiff claims to have purchased three lots of sodium nitrate belonging to the Government, located at Middletown, Pennsylvania, Nitro, West Virginia, and Jacksonville, Tennessee, at an auction sale authorized by the Secretary of War. The petition alleges with care and detail the facts relied upon to establish the sale and purchase, and the plaintiff's willingness to comply with the advertised terms. The Secretary refused to approve the price bid for the property or to enter into contract for its delivery. It is averred that the Secretary of War caused to be circulated an advertisement of a public sale, at auction, of approximately 40,000 tons of sodium nitrate, located at the three places mentioned, upon terms stated in the advertisement, which is made Exhibit B to the petition. This Exhibit B purports to fix the time and place of the proposed "sale by auction," with a description of the lots of nitrate, stating in general terms its quality, with a reservation that the Government did not guarantee the quality, and, under a heading of "terms of sale," stating that the material would be sold "as is" "where is" in its present condition at the several plants. It was required that a purchaser make a deposit in cash or United States bonds of ten per cent of his bid, which would be "retained by the United States to apply against the last shipment of the sodium nitrate on the contract with the purchaser." Distinguishing between purchases of 500 tons or less and those in excess of 500 tons it is stated in Exhibit B that in the latter case the purchaser would be required "upon acceptance of his bid and before delivery of nitrate to enter into a written contract embodying" certain terms, and to give bond in double amount of his bid, "with surety acceptable to the Secretary of War," conditioned upon the faithful performance of the contract. A clause appearing in this exhibit and dwelt on in argument is as follows:

"Acceptance by the Government of any bid will not be final until the execution of a contract and bond, and upon failure by the purchaser within ten days after notice of the acceptance of his bid to execute said contract the Government may withdraw such acceptance and make such disposition of said nitrate as it may desire free of any claim of purchaser in which event the 10% theretofore paid [fol. 30] upon the acceptance of said bid shall be forfeited to the United States as liquidated damages."

It is averred that "the Secretary of War, by Robert Fox, his duly appointed auctioneer, did offer for sale as a part of the sodium nitrate so advertised for sale," one lot of 13,920 short tons located at Middletown; that plaintiff bid for the same "upon the terms and conditions offered in the circular advertisement of auction sale" the sum of $25 per ton; that this was the highest bid for this lot, and that "the same was then and there knocked down and sold to this claimant at the said price, upon the terms and conditions set

forth" in Exhibit B. The plaintiff made the ten per cent deposit, and by its duly authorized agent called upon the Secretary of War prepared to enter into the contemplated contract, but that official refused to make the contract and declared the price inadequate. As to the other two lots of nitrate the petition makes similar averments of purchase at said sale, and avers the deposit of the required ten per cent, the offer to enter into contracts and the Secretary's refusal, as already stated.

The plaintiff therefore claims that it became the purchaser at the alleged auction sale of the three lots of sodium nitrate; that it purchased one lot of 13,920 tons at $25 per ton, which on the date of sale, and to and including the day of the rejection of its bid, was of the fair market value of $63.60 per ton; another lot of 5,000 tons at $25 per ton, which on these dates was of the fair market value of $66.08 per ton; and the third lot of 10,600 tons at $22.50 per ton, which was of the fair market value of $66.43 per ton. The aggregate amount of its bids was $711,500, and the aggregate amount at the stated fair market value of the nitrate was $1,919,870. The difference between these sums, or $1,208,370, the plaintiff claims it is entitled to recover in this suit.

The law under which plaintiff claims the Secretary acted in authorizing the auction sale is a proviso in the act of July 11, 1919, making appropriations for the Army, 41 Stat. 105, reading as follows:

"Provided further, That in addition to the delivery of the property heretofore authorized to be delivered to the Public Health Service, the Department of Agriculture, and the Post Office Department of the Government, the Secretary of War be, and he is hereby, authorized to sell any surplus supplies, including motor trucks and automobiles now owned by and in the possession of the Government for the use of the War Department to any State or municipal subdivision thereof, or to any corporation or individual upon such terms as may be deemed best."

There were several statutes purporting to regulate sales of materials and products acquired before or during the war. There were also several enactments relating peculiarly to nitrates. The national defense act of June 3, 1916, 39 Stat. 215, authorized the President to construct plants for the production of nitrates and other products for munitions of war and useful in the manufacture of fertilizers, and provided that the products of such plants should be used by him for military and naval purposes "to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he [fol. 31] may prescribe." Section 27 of the act of August 10, 1917, 40 Stat. 287, authorized the President to procure, or aid in procuring, stocks of nitrate of soda found to be necessary and available for increasing agricultural production during the years 1917 and 1918 and to make such regulations as he might deem proper to carry out that purpose. This was extended for the purposes named to the duration of the war by the urgent deficiencies act of October 1, 1918, making appropriations for the Department of Agriculture, 40 Stat. 1007; the moneys received for or in connection with the disposi-

tion of nitrate of soda pursuant to section 27 above mentioned were made available as a revolving fund to be used at the discretion of the President for extending the operation of that section, and provided that nothing in this last act should be construed as prohibiting the sale or disposal of nitrates remaining on hand at the time of the termination of the war. The prime purpose of producing these nitrates, so far as authorized by the national defense act, may have been for the use of the Army and Naval establishments, but, coupled closely with that purpose in this act and an intention running through the other acts mentioned, was that sodium nitrate was to be made or procured to aid in agricultural production. This is shown clearly by the joint resolution of April 23, 1920, 41 Stat. 573, whereby the Secretary of War was authorized to sell for cash "at the prevailing market price at the time of the sale" 100,000 tons of nitrate of soda, then held as a reserve supply of the War Department, the authorized sale to be made to users and distributors and in quantities of not exceeding 100 tons to any one purchaser.

Certain statutes had authorized the delivery of property by the Secretary of War to three other departments, as follows: By the act of March 3, 1919, 40 Stat. 1303, the Secretary of War was directed to transfer, without charge, for the use of the Public Health Service such hospital furniture and equipment, including hospital and medical supplies, motor trucks and other vehicles, not required by the War Department, "as may be required by the Public Health Service for its hospitals." By the act of February 28, 1919, making appropriations for the Post Office Department, 40 Stat. 1194, the Secretary of War and the Secretary of the Navy were directed to deliver to the Postmaster General upon his request and as provided in the act such aeroplane machines, supplies, equipment, and parts as were serviceable and available for "the aeroplane mail service," the same to be out of any equipment on hand or under construction. Section 7 of this same act, 40 Stat. 1201, authorized the Secretary of War in his discretion to transfer to the Secretary of Agriculture "all available war material, equipment, and supplies not needed for the purposes of the War Department, but suitable for use in the improvement of highways," and their distribution among the highway departments of the several States. It is to these provisions in the two acts mentioned that the proviso in the act of July 11 refers when it says that "in addition" to the delivery of the property to the Public Health Service, the Department of Agriculture, and the Post Office Department, the Secretary of War was authorized to sell "any surplus supplies, including motor trucks and automobiles" in possession of the Government, "for the use of the War Department," to any State or person upon such terms as may be deemed best. By the [fol. 32] act of March 15, 1920, 41 Stat. 530, the transfer of certain surplus motor-propelled vehicles, equipment, and material was again authorized, that to be transferred to the Department of Agriculture being more specifically named, and all in accordance with the act of February 28, 1919, already mentioned. This act of March 15 provides that the proviso in the act of July 11 now under consideration was not to be construed as amended or repealed by this act, except as to the transfer of those articles specifically named to be trans-

ferred to the Department of Agriculture. This act accentuates the fact that the supplies which the act of July 11 authorized to be sold by the Secretary of War were surplus supplies held for the use of the War Department.

There were other acts authorizing sales of war supplies and other materials. The act of May 10, 1918, 40 Stat. 548, empowered the President during the existing emergency, in his discretion and upon such terms as he should deem expedient, through the head of any executive department, to sell any supplies, materials, equipment or other property "heretofore or hereafter acquired by the United States in connection with, or incidental to, the prosecution of the war." This was followed by the act of July 9, 1918, 40 Stat. 850, which empowered the President, through the head of any executive department, to sell "upon such terms as the head of such department shall deem expedient * * * any war supplies, material, and equipment, and any by-products thereof, and any buildings," etc., acquired since April 6, 1917.

It is not to be presumed that Congress intended by the act of July 11 to take away from the President the power of disposition authorized by the act of July 9, 1918, and in view of these statutes, and especially of the legislation addressed peculiarly to the production and disposition of nitrates, it is open to serious question whether the act of July 11 contemplated the sale of sodium nitrate under the general designation of "surplus supplies" for the use of the War Department referred to in the act. If it authorized sales of nitrate by the Secretary upon such terms as he might deem best, including sales at auction, it is strange that by a joint resolution subsequently passed it was deemed necessary to authorize a sale of 100,000 tons of the reserve supply at the stated market price and in limited quantities to each purchaser. That the joint resolution was a limitation on the authority conferred by the act of July 11 we think there can be no question if it were conceded that the act ever authorized a sale of sodium nitrate.

But in the view we take of this case it is not necessary to dwell upon the distinction between the several acts or to go to the extent of holding that the act of July 11 did not authorize a sale of the nitrate in question.

The plaintiff contends that the sale was an auction sale, as the term is generally understood, and that when the auctioneer's hammer fell on its bids they constituted acceptances by the United States, and completed binding contracts of sale, passing title to plaintiff. It may be conceded that at an ordinary auction sale the rule as stated by plaintiff generally prevails that "as soon as the hammer falls" the bargain is considered as concluded. But in sales under a statute such [fol. 33] as we are considering or in the absence of statutory authority with appropriate regulations governing the same, a sale of Government property is not effected by "the fall of the hammer." The applicable rule in such cases is more analogous to that governing judicial sales than to auction sales where the property is knocked down by an auctioneer to the highest bidder. At a judicial sale, though conducted to all appearances as an auction, at public outcry the bid is in legal effect only an offer to take the property at the price

bid, and the acceptance or rejection of that offer is within the equitable discretion of the court. Such a sale is not final, nor can the purchaser have a legal title to the property he means to buy and has bid for until the sale is confirmed. Camden v. Mayhew, 129 U. S. 73, 82; Nalle v. Young, 160 U. S., 624, 637; Ballentyne v. Smith, 205 U. S., 285, 290. The sale in question was not a judicial sale, but the only authority for it must be found in the act of Congress under which the Secretary proceeded. The statutes mentioned, which purport to authorize sales by the Secretary, repose a power and authority in the exercise of which judgment and discretion must be used. He can say when a sale shall be made and pass upon the sufficiency of the price. It may be conceded that the method of securing bids is determinable by him. But an auctioneer has no such power, and is not the person in whom the statute confides authority. The Secretary may not thus divest himself of it. The sale, if such it may be called, was not final, and no title passed until the bid (or the contemplated contract) was finally approved by the official who lawfully represented the Government, and in whom was vested judgment and discretion to make a sale. The most that can be claimed for the bids at the alleged auction sale is that they were proposals which the Secretary could accept, and until they were duly accepted by him there was no approval of them, and consequently no sale.

There are statutes and appropriate regulations affecting sales of Government property at auction. See Secs. 1241, 1541, Army Regulations (1917), 680, 710. These statutes are strictly construed. Cooper's case, 1 C. Cls., 85; Steele case, 19 C. Cls., 181; 113 U. S., 128. In the last-named case this court held that where the act provided for a public sale an attempted private sale was void, saying that when a statute directs a public officer to do a certain thing in a certain way it is a prohibition of his doing it in any other way. The Supreme Court affirming the judgment held that the appellant was chargeable with knowledge of the fact that the sale was illegal. In the instant case there was no statutory direction to sell at public auction, and authority to make such a sale binding upon the Government at the fall of the auctioneer's hammer can not be implied. The Secretary of War evidently did not deem the bid at auction or the knocking down of the property by the auctioneer to have concluded the matter. He did not proceed upon the theory of sale which plaintiff insists upon, and on the contrary he refused to treat it as a consummated transaction. The advertisement of the sale, we think, notified persons submitting bids that they were subject to approval. And if the printed notice had been less definite the law itself was a sufficient notice of its terms and of the powers conferred by it. [fol. 34] Everyone must take notice of the extent of authority conferred by law upon a person acting in an official capacity. Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. See Whiteside case, 93 U. S., 247.

The demurrer to the petition should be sustained and the petition dismissed. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge; and Booth, Judge, concur.

[fol. 35] VI. JUDGMENT OF THE COURT—Filed April 16, 1923

At a Court of Claims held in the City of Washington on the Sixteenth day of April, A. D., 1923, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiff's amended petition, on consideration whereof the court is of the opinion that the demurrer is well taken.

It is therefore ordered, adjudged and decreed that the defendant's said demurrer to the plaintiff's amended petition be sustained, and that the petition be and the same is hereby dismissed.

By the Court.

VII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed May 9, 1923

From the judgment rendered in the above-entitled cause on the 16th day of April, 1923, in favor of the defendant, the claimant, by its attorney, on the 8th day of May, 1923, makes application for and gives notice of an appeal to the Supreme Court of the United States.

Walter John King, Attorney for Claimant.

VIII. ORDER OF COURT ALLOWING APPEAL—Filed May 21, 1923

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed. By the Court.

[fol. 36] CLERK'S CERTIFICATE

[Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case on demurrer; of the opeinion of the court by Campbell, Ch. J.; of the judgment of the court; of the plaintiff's application for appeal to the Supreme Court of the United States, and of the order of the court allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twenty-first day of May, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 29,659. Court of Claims. Term No. 351. Erie Coal & Coke Corporation, appellant, vs. The United States. Filed June 2, 1923. File No. 29,659.